

SIERRA CLUB, UTAH CHAPTER

IBLA 81-655

Decided March 15, 1982

Appeal from decision of Utah State Office, Bureau of Land Management, denying protest of elimination of a unit from further consideration as a wilderness study area. UT-060-138.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), will be set aside and the case remanded to BLM where on appeal the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite outstanding opportunity for solitude or a primitive and unconfined type of recreation, and the record does not adequately support BLM's conclusion on that criterion.

APPEARANCES: James Catlin, Conservation Chairman, Sierra Club, Utah Chapter, Salt Lake City, Utah, for appellant; Carolyn L. Driscoll, Esq., Special Assistant Attorney General, State of Utah, for amicus curiae State of Utah; Barbara I. Berschler, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Sierra Club, Utah Chapter, has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated February 26, 1981, denying its protest of the elimination of inventory unit UT-060-138 (Negro Bill Canyon) from further consideration as a wilderness study area (WSA).

On November 14, 1980, the BLM State Office published its final intensive wilderness inventory decision in the Federal Register (45 FR 75602), in part eliminating unit UT-060-138 (containing 9,240 acres of land) from further consideration as a WSA. By letter dated December 15, 1980, appellant protested elimination of the unit from further consideration as a WSA, contending that, in contrast with BLM's assessment, the unit has outstanding opportunities for both solitude and a primitive and unconfined type of recreation. Appellant argued that the outstanding opportunities for solitude are provided by "lush vegetation" and "topographic diversity." Appellant also contended that outstanding opportunities for a primitive and unconfined type of recreation existed, citing hunting, hiking, swimming, and wildlife observation. "Increased visitation," appellant asserted, indicated the presence of such opportunities. Appellant argued further that BLM had improperly considered the extent to which adjacent non-Federal lands detract from outstanding opportunities for solitude within the unit, in violation of Organic Act Directive (OAD) 78-61, Change 3, dated July 12, 1979. ^{1/} Appellant stated that such lands "are not developed, and in no way detract from the visitor experience in the canyon."

In its February 26, 1981, decision, BLM responded to appellant's protest, noting that appellant had provided "no new information" that had not previously been considered. BLM stated that it could not consider "present use" in evaluating outstanding opportunities for a primitive and unconfined type of recreation, citing OAD 78-61, Change 3, at 4: "Present visitor use of a unit is not relevant to evaluating this criterion. The factor to be determined is whether an outstanding opportunity is present, regardless of present amount of use." (Emphasis in original.) With regard to non-Federal lands, BLM stated that it had not violated the "sights and sounds" criterion of OAD 78-61, Change 3, because it had not inventoried such land: "If we were to inventory non-Federal lands outside of the unit, as you suggest, we could, and perhaps rightly so, be accused of these violations" (Decision at 2). BLM further stated that:

Two State sections (Sec. 36, T.26S., R.22E. and Sec. 32, T.25S., R.22E.) [^{2/}] cut completely across Negro Bill Canyon, removing two one-mile canyon segments from the unit. We feel that this pattern does adversely affect opportunities for solitude by constricting the unit in two places to less than one mile in width on public land. The constricted areas are not in the canyon system proper, but on the relatively flat area leading to Porcupine Rim. It would be difficult to avoid sights and sounds of others within these portions of the unit where it is less than

^{1/} Appellant makes reference to language in OAD 78-61, Change 3, at 4: "Imprints of man outside a unit ('sights and sounds'). Assessing the effects of the imprints of man which occur outside a unit is generally a factor to be considered during study." (Emphasis in original.)

^{2/} From a review of pertinent maps, it would appear that BLM meant sec. 32, T. 25 S., R. 23 E., instead of "sec. 32, T.25S., R.22E."

one mile wide, especially since topography is fairly open in these areas. The constrictions adversely affect opportunities for primitive and unconfined recreation because a recreationist would have to climb out of the canyon onto the more open areas to stay within the unit. Travel patterns * * * within the constricted areas would necessarily be limited. The pattern of non-Federal lands, reflected in unit boundaries, adversely affects opportunities for solitude and primitive and unconfined recreation.

Id.

The BLM State Office decision was made pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976), which provides, in relevant part, that: "[T]he Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 [16 U.S.C. § 1131 (1976)]." 43 U.S.C. § 1782(a) (1976). From time to time thereafter, the Secretary is required to report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness. Congress will make the final decision with respect to designating wilderness areas, after a recommendation by the President. 43 U.S.C. § 1782(b) (1976).

The wilderness review undertaken by the BLM State Office pursuant to sections 201(a) and 603(a) of FLPMA has been divided into three phases by BLM: Inventory, study, and reporting. See Wilderness Inventory Handbook (WIH), dated September 27, 1978, at 3. The first phase was further divided into an initial and an intensive inventory stage. The November 1980 BLM decision marked the end of the inventory phase of the review process and the beginning of the study phase.

In its statement of reasons for appeal, appellant expands substantially on the arguments made in its protest. In addition, it includes certain arguments directed to BLM's final initial inventory decision. Specifically with respect to that decision, appellant contends that BLM should have designated approximately all of the original 26,800 acres in unit UT-060-138 as a WSA. Appellant argues that BLM in its initial inventory improperly divided the unit into two subunits, UT-060-138A and UT-060-138B, thereby compromising the "wilderness integrity" of both units. 3/ Appellant states that BLM then proceeded improperly to delete 18,394 acres from subunit UT-060-138A (now unit UT-060-138). However, since the time for filing an appeal from BLM's initial inventory decision has passed, appellant may not properly invoke the Board's jurisdiction to consider the propriety of BLM's final initial inventory decision.

3/ Subunit UT-060-138B was apparently dropped from further consideration in the intensive inventory because it lacked the requisite 5,000 acres.

Our review is, therefore, limited to consideration of BLM's decision denying appellant's protest, the underlying final intensive inventory decision, and supporting data.

Unit UT-060-138 is described in the "Wilderness Intensive Inventory," dated February 1980, at 2:

The main topographic feature of this unit is Negro Bill Canyon, draining west along the southern boundary of the unit. This canyon is over 500 feet deep at the mouth, and 400 feet deep nine miles upstream where it leaves the unit. It is steep-walled throughout, with many vertical sandstone faces, especially in the lower portion. The canyon is eleven miles long, although state sections cross it in two places near its head, leaving only about 7 1/2 miles in the unit. There is a perennial stream in the canyon. The remainder of the unit is mesa toplands with a good deal of relief in most areas. In the western corner, there is an area of exposed sandstone fins, and there are many short, deep, and steep side canyons of Negro Bill in the south. Jackass Canyon drains west for about 4 miles through the central part of the unit, but becomes deep only at the mouth. Through most of the unit it is 100 to 200 feet deep with moderately sloping walls.

BLM's decision to drop the unit from further consideration as a WSA was based on the absence of either an outstanding opportunity for solitude or a primitive and unconfined type of recreation. ^{4/} In its November 1980 "Final Decision on Wilderness Study Areas," at 299, BLM offers the following assessment of the opportunities for solitude and a primitive and unconfined type of recreation:

1. SOLITUDE: Topographic screening exists in Negro Bill Canyon and in the area of sandstone fins. Vegetative screening is present in the eastern part of the unit, but is very limited in the west. Riparian vegetation in the bottom of the canyon provides some localized screening. The narrow configuration of the unit and non-Federal land ownership patterns detract from the opportunities for solitude within the unit. Negro Bill Canyon provides some vertical separation, but the narrow configuration combined with non-Federal land ownership patterns which cut the canyon in two places diminish opportunities which might otherwise be present. [^{5/}] Side canyons running into Negro Bill

^{4/} This is one of the three key wilderness characteristics set forth in § 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976), required to be assessed during the inventory conducted pursuant to § 603(a) of FLPMA. The other two characteristics are size and naturalness. WIH, at 6.

^{5/} The extent to which the configuration of the unit affects the opportunities for solitude is discussed in the "Wilderness Intensive Inventory," at 3:

Canyon are not extensive enough to provide outstanding opportunities for solitude.
6/

2. PRIMITIVE AND UNCONFINED RECREATION: Negro Bill Canyon offers some opportunities to hike, camp, picnic, swim and wade. The high sandstone fins east of the canyon mouth also offer hiking opportunities. However, the limited extent of any one of these areas renders opportunities less than outstanding. 7/ The unit does not offer a diversity of recreation pursuits.

In its statement of reasons for appeal, appellant disputes BLM's assessment that unit UT-060-138 lacks outstanding opportunities for solitude or a primitive and unconfined type of recreation, basing its assessment on the record, including public comments submitted during the intensive inventory, and a number of affidavits submitted with its appeal.

In support, appellant cites an assessment of the opportunities for solitude or a primitive and unconfined type of recreation in the "Wilderness Inventory Situation Evaluation," at 3, which recommended unit UT-060-138 for an intensive inventory and was approved by the BLM district manager on March 12, 1979:

There are outstanding opportunities for solitude in the sandstone fins, and Negro Bill Canyon is deep and winding so that sights and sounds of other people would be easily avoided. The presence of water in the canyon in conjunction with the rock formations in the fins and supplemental scenic values in much of the unit provide outstanding opportunities for primitive and unconfined

"The configuration of the natural part of this unit adversely affects opportunities for solitude that might be present. The natural area forms a strip along the southern edge of the unit varying from 2 miles to 1/2 mile in width. The canyon is cut by one State section jutting into the unit, and truncated by a second State section at its eastern end. About 1 mile of canyon runs between these two sections. The portion of the natural area that is at least one mile wide totals about 4,500 acres, below minimum size requirements." (Emphasis added.)

6/ The remainder of the unit consists of "sparsely vegetated blowsand flats." "Wilderness Intensive Inventory," at 3a.

7/ The "Wilderness Intensive Inventory," at 4, states:

"Negro Bill Canyon provides a perennial stream with riparian vegetation and natural pools. Portions of the canyon provide hiking, camping, and backpacking opportunities. The canyon is cut, however, by State land, and the extent of these recreational opportunities is not great. The remainder of the unit lacks focal features or challenging terrain." (Emphasis added.)

recreation. Since this unit basically retains its natural appearance and provides outstanding opportunities for both solitude and primitive recreation, it should be intensively inventoried for wilderness.

Statement of Reasons, Exh. 1.

Appellant also submits a draft copy of the "Wilderness Intensive Inventory" prepared in February 1980 by Peter Viavant, which concluded that outstanding opportunities for solitude and a primitive and unconfined type of recreation are present in unit UT-060-138 (Affidavit of James Corbett Catlin, dated June 23, 1981, Exh. 1). Appellant's representative states that he questioned Viavant and Viavant told him that the draft version was exactly the same as the text of the final that Viavant had prepared on the inventory forms and signed. Id. at 2. The sections dealing with such opportunities, prepared by Viavant, were deleted from the final inventory report in the case file. Id. at 2-3. Viavant's draft inventory report included the following assessment of opportunities for solitude:

Topographic screening is especially good in Negro Bill Canyon due to the depth and winding nature of the canyon. Topography also provides some screening on most of the toplands north of the canyon. Vegetation provides very good screening in parts of Negro Bill Canyon, but vegetative screening is limited in the rest of this unit, particularly in the west.

The configuration of this unit appears to limit opportunities for solitude. Although the unit is narrow in places, the vertical isolation provided by Negro Bill Canyon is sufficient to provide outstanding opportunities for solitude. In the east, where state sections cut across the canyon in two places, side canyons branch off to the north of Negro Bill Canyon. These provide routes which can be followed out of or into the main canyon, and they also give this area north of the rim a substantial amount of topographic relief. The moderately dense pinyon-juniper cover at this eastern part of the unit provides vegetative screening which combines with the topographic screening to offer outstanding opportunities for solitude in this eastern portion of the unit, despite its narrow configuration.

SUMMARY OF SOLITUDE: Outstanding opportunities for solitude exist in Negro Bill Canyon, and its side canyons, provided by both topographic and vegetative screening. The steep canyon walls give a feeling of being cut off from the world beyond the canyon. The area of sandstone fins in the southwest corner of the unit also provides outstanding opportunities for solitude. Topographic screening provides opportunities for solitude in some other parts of the unit, but they are not outstanding.

(Affidavit of James Corbett Catlin, Exh. 1, at 3).

The draft inventory report also included the following assessment of opportunities for a primitive and unconfined type of recreation:

Negro Bill Canyon (with its perennial stream, riparian vegetation, and wading/swimming holes) provides a focal feature in this unit. People are drawn to this area to hike, camp, swim and wade. The upper reaches of the canyon offer some challenging terrain, as do many of the side canyons. The canyon totals about eleven miles long, and is over six miles long to where it first enters state land. Supplemental values present in the canyon area enhance the outstanding opportunities for primitive and unconfined recreation present in Negro Bill Canyon. The fins east of the mouth of the canyon also offer outstanding opportunities to climb and explore. The remainder of the unit (from Jackass Canyon north) does offer recreation opportunities, but due to a lack of focal features and varied or challenging terrain, these opportunities are not outstanding.

Id. at 4.

The Wilderness Intensive Inventory report contained in the case file consists of a number of pages devoted to concise narrative statements, summaries, and conclusions concerning various factors. These factors are size, naturalness, solitude, primitive and unconfined recreation, supplemental values, and the possibility of certain areas returning to a natural condition. The report contains a space for a signature and date following the assessment and conclusion for each factor. The signature "Peter Viavant" and the date "28/FEB/80" appear for each factor, except solitude and recreation. One Diana Webb concluded, dated February 29, 1980, that the unit did not have outstanding opportunities for solitude, and dated February 28, 1980, that the unit did not have outstanding opportunities for a primitive and unconfined type of recreation.

Appellant has also submitted a number of affidavits which attest to the outstanding opportunities for solitude and a primitive and unconfined type of recreation and which are based largely on personal experience. One affiant states:

From the mouth of the canyon, the walls of Negro Bill shoot straight up for over 200 feet, decorated by the red and black streaks of iron leaching and desert varnish. They resemble large rock tapestries towering above the canyon floor. About a mile up the canyon, the main drainage curves dramatically to the east, while another fork stems to the south. This smaller fork shows a few signs of humans, but provides enjoyable exploration. In following the main drainage, the canyon gets narrower and deeper, winding around bends and curves. The stream bed meanders over smooth red rocks and through thick willows, oatbrush,

and tamarisk. All of these characteristics provide significant screening and block views up or down the drainage past a few hundred feet.

(Affidavit of Katherine P. Kitchell, dated June 22, 1981, at 2). Another reports that: "The vegetation and twisting canyon walls made it difficult for me to see any other people even if they were there" (Affidavit of Bruce C. Tucker, dated June 23, 1981, at 9). A third states: "Even more outstanding solitude is offered by the side canyons, which are choked with vegetation or have such rugged topography that people are easily hidden in the deep gulches or among huge, multi-level rock formations" (Affidavit of Joseph M. Bauman, Jr., dated June 24, 1981, at 4). The affidavits submitted by appellant also attest to the outstanding opportunities for a primitive and unconfined type of recreation, in the form of hiking, camping, photography, nature study, rock climbing, fishing, swimming, and wading. Appellant argues that some of these opportunities are outstanding individually and that the diversity of opportunities is also outstanding. One of the affiants indicates that the canyon, because of its perennial stream, offers a unique setting for wildlife study because of the overlapping of two ecological transition zones (Affidavit of Laura Vellenga, dated June 15, 1981, at 3).

[1] After a careful review of the record, we conclude that BLM did not adequately consider all of the factors involved in a determination of whether unit UT-060-138 has the requisite outstanding opportunity for solitude or a primitive and unconfined type of recreation. The critical flaw, we believe, in BLM's assessment of the outstanding opportunities for solitude or a primitive and unconfined type of recreation is its apparent reliance on the limited extent of the opportunities for solitude or a primitive and unconfined type of recreation. The record indicates that BLM appears to confuse the wilderness characteristic of size with that of outstanding opportunities for solitude. In the "Wilderness Intensive Inventory," at 3, BLM states that the canyon area where opportunities for solitude are present, as distinguished from other areas in the unit, "totals about 4,500 acres, below minimum size requirements" (emphasis added). This is reiterated in BLM's response to appellant's protest, at 2-3:

The BLM does not find Negro Bill Canyon to meet the criteria for a WSA. The canyon itself is less than 5,000 acres in extent. * * * The unit is constricted in two places by land ownership patterns. If the BLM eliminated the constricted areas from the unit due to land configuration, the remaining natural area would be less than 5,000 acres, as pointed out in the intensive inventory file narrative.

It appears that BLM was influenced to conclude that no outstanding opportunity for solitude existed because the canyon area was less than 5,000 acres. There is no requirement, however, that in order for a unit to have an outstanding opportunity for solitude that the area having such opportunities must be at least 5,000 acres. Furthermore,

OAD 78-61, Change 3, states at 3: "A unit is not to be disqualified on the basis that an outstanding opportunity exists only in a portion of the unit. Each individual acre of land does not have to meet the outstanding opportunity criterion. Obviously, there must be an outstanding opportunity somewhere in the unit." (Emphasis in original.) See Tri-County Cattlemen's Association, 60 IBLA 305 (1981). While we accord substantial deference to BLM in such matters due to the subjective judgment involved, the record in this case does not support BLM's conclusion that this unit lacks outstanding opportunities for solitude. The record indicates that the canyon extends in a narrow band for 7-1/2 miles in the unit, with topographic and/or vegetative screening, before it enters state land. There is no question that the canyon offers opportunities for solitude. The only question appears to be whether such opportunities are "outstanding." Merely because the canyon is narrow or because it is intersected by state land does not prevent opportunities from being outstanding.

BLM has discounted the remainder of the unit, other than the canyon area, because it is sparsely vegetated and flat. However, as stated in OAD 78-61, Change 3, at 3-4: "It is erroneous to assume that simply because a unit or portion of a unit is flat and/or unvegetated, it automatically lacks an outstanding opportunity for solitude. * * * Consideration must be given to the interrelationship between size, screening, configuration, and other factors that influence solitude." There is no evidence that BLM considered these factors.

With regard to outstanding opportunities for a primitive and unconfined type of recreation, the WIH states at 14: "An area may possess outstanding opportunities for a primitive and unconfined type of recreation either through the diversity in the number of primitive and unconfined recreational activities possible in the inventory unit or the outstanding quality of one opportunity." Appellant has raised substantial questions whether BLM properly concluded that such opportunities do not exist in the unit, especially within the canyon area itself. BLM admits that the canyon is "rare" because of the presence of a perennial stream. Statement of Reasons, Exh. 4, at 1. We note also that the presence of the stream may foster a unique ecological community for the study of nature. It is not clear whether BLM considered this factor. We cannot find that the nature and extent of the canyon necessarily precludes a finding of outstanding opportunities for a primitive and unconfined type of recreation. 8/

8/ Appellant directs our attention to the BLM Moab district manager's proposed policy in wilderness cases, enunciated at a December 1978 staff meeting. As proposed it was to concentrate on prime areas and exclude those about which there was some doubt. There is no evidence, however, that such a questionable policy was ever implemented or that the WSA determination in this case was influenced by that policy. See Sierra Club, 62 IBLA 329 (1982). In addition, appellant cites an agreement (Statement of Reasons, Exh. 4) that BLM reached with Grand County, Utah, under which BLM agreed in part to improve and maintain an access road for the length of a quarter mile near the entrance to the canyon and to construct and maintain a parking-picnic area at the end of the

As we have stated many times, BLM's subjective judgment concerning the outstanding opportunity criterion is entitled to considerable deference, and an appellant seeking to substitute its subjective judgment for that of BLM has a particularly heavy burden to overcome that deference. City of Colorado Springs, 61 IBLA 124, 127 (1982); Conoco, Inc., 61 IBLA 23, 28 (1981). In this case appellant has raised substantial questions concerning BLM's conclusion on this criterion. The record discloses internal disagreement in BLM regarding this criterion; yet, there is no evidence in the record to indicate how that disagreement was resolved. The relevant guidelines for documentation of internal differences is found in OAD 78-61, Change 3, at 1:

In cases where staff, District Manager, and/or State Director recommendations do not agree, a narrative explanation of the changed recommendation must be included in the intensive inventory documentation file, in all summary narrative documents, and in any other information available to the public. The original intensive inventory form is not to be modified through erasures, deletions, or additions.

In addition, as set forth above, it appears that BLM's conclusion that the unit lacked outstanding opportunities was based, at least in part, on improper assumptions.

We must conclude that BLM has not adequately considered all the factors involved in a determination under the outstanding opportunity criterion. Under the circumstances, we believe the best course is to remand the case to BLM to allow it to reassess the outstanding opportunity criterion in light of our discussion in this case. During its reassessment, BLM should give consideration to the information submitted by appellant in this appeal. BLM should issue a decision on its reassessment indicating whether unit UT-060-138 has the requisite wilderness characteristics. If it does, pursuant to section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), it must be designated a WSA. If it does not, it should be eliminated from further wilderness review. Any person adversely affected by BLM's decision on remand shall, of course, have the right to appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

road. This agreement does not appear to relate to the assessment of the outstanding opportunity criterion. While appellant argues that actions taken or to be taken under the agreement violate the "nonimpairment mandate" of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), that it not an issue for consideration in this appeal. We note that units or portions of units eliminated from further wilderness review are no longer subject to the management restrictions of section 603(c). However, in this case the timely protest and appeal require that unit UT-060-138 remain subject to the management restrictions until final disposition of the protest and appeal.

appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

